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In The

Supreme Court of the United States

STATE OF KANSAS,

Plaintiff,

v.

STATE OF COLORADO,

Defendant,

UNITED STATES OF AMERICA,

Defendant-Intervenor.

On Exceptions To The Report Of The Special Master

COLORADO'S REPLY BRIEF IN OPPOSITION TO KANSAS' EXCEPTION TO THE THIRD REPORT OF THE SPECIAL MASTER

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QUESTIONS PRESENTED

1. Is there a "general rule" that prejudgment interest should be awarded on damages for violation of an interstate water compact, absent some exceptional circumstance?

2. Should prejudgment interest be awarded on damages for violation of the Arkansas River Compact before Colorado knew, or should have known, that post-Compact well pumping in Colorado was depleting usable Stateline flows in violation of the Compact?

3. Are the circumstances identified by the Special Master appropriate reasons for denying prejudgment interest?

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COLORADO'S REPLY BRIEF IN OPPOSITION TO KANSAS' EXCEPTION TO THE THIRD REPORT OF THE SPECIAL MASTER

PROVISIONS OF THE ARKANSAS RIVER COMPACT INVOLVED

The Kansas exception to the Third Report of the Special Master involves the following provisions of the Arkansas River Compact, 63 Stat. 145 (1949):

ARTICLE I

The major purposes of this Compact are to:

A. Settle existing disputes and remove causes of future controversy between the States of Colorado and Kansas, and between citizens of one and citizens of the other State, concerning the waters of the Arkansas River and their control, conservation and utilization for irrigation and other beneficial purposes.

B. Equitably divide and apportion between the States of Colorado and Kansas the waters of the Arkansas River and their utilization as well as the benefits arising from the construction, operation and maintenance by the United States of John Martin Reservoir Project for water conservation purposes.

ARTICLE IV

* * *

D. This Compact is not intended to impede or prevent future beneficial development of the Arkansas River basin in Colorado and Kansas by Federal or State agencies, by

private enterprise, or by combinations thereof, which may involve construction of dams, reservoir,[1] and other works for the purposes of water utilization and control, as well as the improved or prolonged functioning of existing works: Provided, that the waters of the Arkansas River, as defined in Article III, shall not be materially depleted in usable quantity or availability for use to the water users in Colorado and Kansas under this Compact by such future development or construction.

* * *

ARTICLE VII

A. Each State shall be subject to the terms of this Compact. Where the name of the State or the term "State" is used in this Compact these shall be construed to include any person or entity of any nature whatsoever using, claiming or in any manner asserting any right to the use of the waters of the Arkansas River under the authority of that State.

* * *

ARTICLE VIII

A. To administer the provisions of this Compact there is hereby created an interstate

[1] Article IV-D of the Compact as printed in 63 Stat. 145 contains a typographical error. The Compact as signed by the Commissioners said "reservoirs."

agency to be known as the Arkansas River Compact Administration herein designated as "the Administration".

* * *

C. The membership of the Administration shall consist of three representatives from each State who shall be appointed by the respective Governors for a term not to exceed four years. One Colorado representative shall be a resident of and water right owner in Water Districts 14 or 17, one Colorado representative shall be a resident of and water right owner in Water District 67, and one Colorado representative shall be the Director of the Colorado Water Conservation Board. Two Kansas representatives shall be residents of and water right owners in the counties of Finney, Kearny or Hamilton, and one Kansas representative shall be the chief State official charged with the administration of water rights in Kansas. The President of the United States is hereby requested to designate a representative of the United States, and if a representative is so designated he shall be an ex-officio member and act as chairman of the Administration without vote.

* * *

H. Violation of any of the provisions of this Compact or other actions prejudicial thereto which come to the attention of the Administration shall be promptly investigated by it. When deemed advisable as the result of such investigation, the Administration may report its findings and recommendations to the State official who is charged with the administration of water rights for appropriate action, it being the intent

of this Compact that enforcement of its terms shall be accomplished in general through the State agencies and officials charged with the administration of water rights.

INTRODUCTION AND SUMMARY OF ARGUMENT

The State of Kansas brought this action to enforce its rights under the Arkansas River Compact, which apportions the waters of the Arkansas River between Colorado and Kansas. In an earlier decision, *Kansas v. Colorado*, 514 U.S. 673 (1995), the Court accepted the Special Master's finding that post-Compact well pumping in Colorado had caused material depletions of usable Stateline flows of the Arkansas River in violation of the Compact and remanded the case to the Master for determination of unresolved issues in a manner not inconsistent with its opinion. *Id.* at 693-94.

In his Third Report, the Master recommends that a remedy for past depletions to usable Stateline flows should be in money damages rather than repayment in water. Third Report at 11, 119. He recommends that money damages awarded to Kansas should include all losses that have occurred as a result of Compact violations, including losses suffered by individual water users in Kansas, and that prejudgment interest should be awarded at the rates proposed by Kansas on damages from 1969 to the date of judgment. *Id.* at 12-13, 64, 107, 119-20.

Kansas has taken exception to the Master's recommendation that prejudgment interest be denied on losses

that occurred before 1969. Kansas contends that the Master correctly recognized a "general rule" that prejudgment interest should be awarded in a case such as this one, absent some exceptional circumstance. Brief in Support of Kansas' Exception to the Third Report of the Special Master ("Kansas Brief") at 10, 12-13. Kansas argues that prejudgment interest is an element of just compensation, not a penalty, and that only very limited circumstances would justify a denial of prejudgment interest, such as where a plaintiff has been guilty of undue delay in bringing suit. *Id.* at 11, 13-18. Kansas states that this Court has previously ruled that Kansas was not guilty of undue delay in prosecuting this lawsuit and argues that none of the reasons offered by the Master for his recommendation justifies withholding prejudgment interest. *Id.* at 10-11, 18-26. Finally, Kansas argues that Colorado is strictly liable under the terms of the Compact for a violation of the Compact by its water users, regardless of whether it knew, or should have known, that post-Compact well pumping was violating the Compact. *Id.* at 26-27.

There is no "general rule" that prejudgment interest should be awarded in a case for breach of an interstate water compact. This Court did not hold that damages could be awarded as a remedy for the breach of an interstate water compact until *Texas v. New Mexico*, 482 U.S. 124 (1987), and that case did not address whether prejudgment interest should be awarded. The common-law rule is that prejudgment interest is not awarded on damages for breach of contract unless the claim is liquidated. None of the circumstances in this case justifies a deviation from the common-law rule. However, even if

an award of prejudgment interest is discretionary in this case, an award of prejudgment interest would not be justified before Colorado knew, or should have known, that post-Compact well pumping in Colorado was depleting usable Stateline flows in violation of the Compact. Further, the difficulty of determining depletions to usable Stateline flows caused by post-Compact well pumping was appropriately considered by the Master as a reason for denying prejudgment interest.

Finally, neither *Texas v. New Mexico* nor the express terms of the Arkansas River Compact suggest that Colorado is strictly liable for a violation of the Compact, regardless of whether Colorado knew, or had reason to know, that post-Compact well pumping was violating the Compact. Moreover, an award of damages to Kansas based on losses suffered by individual water users is not compensatory, and an award of prejudgment interest should not result in overcompensating Kansas.

I. THERE IS NO GENERAL RULE THAT PREJUDGMENT INTEREST SHOULD BE AWARDED IN A CASE SUCH AS THIS

Kansas contends that "[t]he Special Master correctly recognized the general rule that prejudgment interest should be awarded in a case such as this one, absent some exceptional circumstance." Kansas Brief at 10. In fact, there is no "general rule" that prejudgment interest should be awarded in a case such as this. This Court did not hold that money damages could be awarded as a remedy for breach of an interstate water compact until *Texas v. New Mexico*, 482 U.S. 124 (1987). Despite the

implication of the Kansas argument, the Court did not address whether prejudgment interest should be awarded if a monetary remedy were recommended in that case. As the Master stated, "there is no case in which prejudgment interest has been awarded that is at all similar to the facts in this dispute." Third Report at 98. The Master pointed out the uniqueness of this case in his Second Report:

> In this case at hand, depletions of usable Stateline flows in violation of the compact reach back to 1950, and Kansas seeks relief, preferably in money damages, for the total amount of the shortfall since 1950. The Court has already ruled that Kansas was not guilty of laches in bringing this action, but nonetheless Kansas did not seek to file its complaint until the end of 1985. The parties then took almost five years in preparing for trial which began in September of 1990. Whether any of the circumstances and developments that have occurred since 1950 may be considered in assessing the appropriateness of prejudgment interest should be a matter of argument and proof in future proceedings of the remedies phase of this case. Much like [*Board of Comm'rs of*] *Jackson County v. United States* [308 U.S. 343 (1939)], we are without "roots in history" in approaching the issue of damages and prejudgment interest in a case of this kind. 308 U.S. at 351, *supra*.

App. to Third Report at 44.

Moreover, the Court's cases that are cited as the basis for the presumption in favor of prejudgment interest are much more limited than Kansas recognizes. *City of Milwaukee v. Cement Div., National Gypsum Co.*, 515 U.S. 189 (1995), the principal case relied on by Kansas, was an

admiralty case, where decrees have historically included prejudgment interest. *Id.* at 194-96. In addition, it was a case for negligence, in which the City of Milwaukee had negligently breached its duty as a wharfinger. *Id.* at 191. In other words, the City knew, or should have known, that its actions involved an unreasonable risk of causing injury. *Cement Div., National Gypsum Co. v. City of Milwaukee*, 915 F.2d 1154, 1157-58 (7th Cir. 1990) (summarizing the district court's findings that the City was negligent and at fault); Restatement (Second) of Torts § 284 (1965); *see also Myron v. Chicoine*, 678 F.2d 727, 733 (7th Cir. 1982) (an award of prejudgment interest is particularly appropriate in cases involving investment fraud).

West Virginia v. United States, 479 U.S. 305 (1987), cited by Kansas as recognizing the compensatory nature of prejudgment interest in contract cases, was a suit by the United States against the State of West Virginia for breach of a contract to pay money. In that case, West Virginia had asked the U.S. Army Corps of Engineers (Corps) to prepare sites for mobile homes to assist victims displaced by disasters. *Id.* at 307. The mobile homes were provided by the Federal Government pursuant to the Disaster Relief Act of 1970, but the Act specifically required the State or local government to provide the sites, without charge to the United States. *Id.* West Virginia found itself unable to provide the sites and asked the Corps to prepare them. *Id.* The Corps agreed and billed West Virginia for its services, which the State then failed to pay. *Id.*

The United States brought suit seeking to recover $4.2 million for site preparation services plus prejudgment interest. *Id.* West Virginia denied liability for the debt, claiming that the State official who had entered into the agreement had acted without authority. *Id.* The District Court rejected the claim and found the State contractually obligated, but concluded that the State should not be liable for prejudgment interest based on an analysis of the policies underlying the Disaster Relief Act. *Id.* at 308. The Fourth Circuit Court of Appeals reversed the denial of prejudgment interest, holding that prejudgment interest was allowable as a matter of right in a breach-of-contract action where the amount due was liquidated, ascertained, or agreed to. *Id.*

This Court then held that the rule governing the interest to be recovered as damages for delayed payment of a contractual obligation to the United States was a matter of federal law and should be governed by a uniform national rule. *Id.* at 308-09. The Court recognized that under *Board of Comm'rs of Jackson County v. United States*, 308 U.S. 343 (1939), interest "could not simply be required with respect to all claims by the United States against a State or its political subdivision." 479 U.S. at 309. The Court held, however, that under the circumstances there was no policy to compel deviation from the longstanding rule that parties owing debts to the Federal Government must pay prejudgment interest where the underlying claim is a contractual obligation to pay money. *Id.* at 310. The Court noted that prejudgment interest is an element of complete compensation and that this federal interest in complete compensation was likely to be present "in any *ordinary commercial contractual*

arrangement between a State and the Federal Government." *Id.* at 310-11 (emphasis added). *See also United States v. Texas*, 507 U.S. 511, 538 (1993) (Debt Collection Act did not abrogate the United States' federal common law right to collect prejudgment interest on debts owed to the Federal Government by the states).[2]

In *General Motors Corp. v. Devex Corp.*, 461 U.S. 648 (1983), another case cited in the Kansas brief, this Court affirmed an award of prejudgment interest in a patent infringement suit under 35 U.S.C. § 284. The statute directed that "[u]pon finding for the claimant the court shall award the claimant damages adequate to compensate for the infringement, . . . together with interest and costs as fixed by the court." 461 U.S. at 652. Decisions by the Court prior to the enactment of § 284 had generally limited awards of prejudgment interest from the date on which damages were liquidated, and prejudgment interest could only be awarded from the date of infringement

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[2] *Funkhouser v. J. B. Preston Co.*, 290 U.S. 163 (1933), the other contract case cited by Kansas as recognizing the compensatory nature of prejudgment interest, involved a New York statute providing for prejudgment interest in any action for breach of contract, whether liquidated or unliquidated, in which a sum of money was awarded by verdict, report, or decision. *Id.* at 165 & n.1. The issue in the case was whether the statute was an unconstitutional impairment of contracts that had been entered into prior to the adoption of the statute. The Court held that the allowance of interest in the case of unliquidated claims was an appropriate subject for legislative action. *Id.* at 168. The Court noted that some courts and commentators had recognized that a distinction simply between liquidated and unliquidated damages was not a sound one, although many jurisdictions continued to follow it. *Id.* at 168-69.

in exceptional circumstances, such as bad faith on the part of the infringer. *Id.* The Court held that the underlying purpose of § 284 strongly suggested that prejudgment interest should ordinarily be awarded, pointing out that a 1946 amendment had taken away the remedy of recovering the infringer's profits. *Id.* at 654.

City of Milwaukee and *General Motors* should be contrasted with *Wilkerson v. Ingalls Shipbuilding, Inc.*, 125 F.3d 904 (5th Cir. 1997), in which an employee claimed prejudgment interest on his disability claim under the Longshore and Harbor Workers' Compensation Act from the date of the injury – a permanent hearing loss resulting from noise he was exposed to at a shipyard. There was a twenty-year lag between the date of the injury and the claim. *Id.* at 906. The Fifth Circuit Court of Appeals agreed that there was a general rule that prejudgment interest should be awarded in maritime cases, but held that under the statute an employee's compensation claim becomes due, if not controverted, fourteen days after he files notice of the claim. *Id.* at 907-08. The Court of Appeals held that to hold that an employee is entitled to interest dating from the time he is injured, rather than fourteen days after he filed notice of the claim, would be to alter the amount of compensation he is due under the statute and thus undermine the will of Congress. *Id.* at 908.

Thus, an examination of the cases in which prejudgment interest is ordinarily awarded reveals that they depend on two prerequisites. First, prejudgment interest has historically been awarded in that area of the law (*e.g.*, admiralty cases), or there is a federal policy calling for complete compensation. Second, they involve an ordinary

commercial contractual arrangement, such as an agreement to pay money, or the party ordered to pay prejudgment interest knew, or should have known, that its actions involved an unreasonable risk of injury to the party claiming prejudgment interest or that its actions violated a federal statute.

In contrast to the cases cited by Kansas, prejudgment interest has not traditionally been awarded on damages for breach of contract unless the claim is liquidated. Even if *West Virginia v. United States* can be read to establish a rule that prejudgment interest should be awarded on damages for breach of any contract to pay money, absent some exceptional circumstance, and that a policy calling for complete compensation is likely to be present in any ordinary commercial contractual arrangement, the underlying claim in this case does not involve the breach of an agreement to pay money and the Arkansas River Compact is not an ordinary commercial contractual arrangement. *Cf. Kentucky v. Indiana*, 281 U.S. 163 (1930) (involving a contract for building a bridge across the Ohio River). Rather, the Compact apportions the waters of an interstate river, a delicate task that involves administrative control over the actions of private individuals. *See Colorado v. Kansas*, 320 U.S. 383, 392 (1943). There is no federal policy calling for complete compensation for losses suffered by individual water users resulting from the breach of an interstate compact. Indeed, the 11th Amendment reflects a policy that states would not be exposed to damages claims by private individuals. *Alden v. Maine*, 527 U.S. 706, ___, 119 S.Ct. 2240, ___, 144 L.Ed. 2d 636, 652, 657 (1999). Finally, at least for many years, this is not a case where Colorado knew, or should have

known, that post-Compact well pumping by private individuals in Colorado was causing violations of the Compact. Thus, the circumstances in this case do not support Kansas' contention that there is a "general rule" favoring an award of prejudgment interest in a case such as this one.

As this Court has recognized, there is a "venerable common-law rule that prejudgment interest is not awarded on unliquidated claims." *City of Milwaukee*, 515 U.S. at 197. The basis of the common-law rule is the perceived unfairness of making the breaching party pay interest on a claim when the breaching party could not know how much to tender to stop the accumulation of interest. *Wickham Contracting Co. v. Local Union No. 3, IBEW*, 955 F.2d 831, 835 (2d Cir.), *cert. denied*, 506 U.S. 946 (1992). The rule has been criticized on the grounds that it does not provide fair compensation to the non-breaching party. *See Miller v. Robertson*, 266 U.S. 243, 258 (1924). While some lower courts have concluded that the common-law rule has been replaced by a rule that an award of prejudgment interest is discretionary, *Wickham Contracting*, 955 F.2d at 835-36, the distinction between damages that are readily ascertainable and those that are not remains a factor that courts have continued to consider in determining whether a party breaching a contract should be treated as an involuntary investor for the non-breaching party. *Id.* at 836. Further, even in suits by the United States against a state or a political subdivision of a state, other than those where the underlying claim is a contractual obligation to pay money, prejudgment interest "is not recoverable according to a rigid theory of compensation for money withheld, but is given in response to considerations of fairness." *Board of Comm'rs of Jackson County v.*

United States, 308 U.S. at 352; *see also Wickham Contracting*, 955 F.2d at 836 (listing factors to be considered in an award of prejudgment interest, including fairness and the relative equities). Thus, even if an award of prejudgment interest is within the sound discretion of the Court in this case, the fact that Colorado did not know, or have reason to know, that post-Compact well pumping was depleting usable Stateline flows in violation of the Compact would be a relevant consideration of fairness in determining whether to award prejudgment interest. *See Board of Comm'rs of Jackson County v. United States*, 308 U.S. at 352-53; *see also Blau v. Lehman*, 368 U.S. 403, 414 (1962).

In summary, the facts in this case do not justify a deviation from the traditional common-law rule that prejudgment interest is not awarded on unliquidated claims. But, even if an award of prejudgment interest is discretionary, considerations of fairness would be relevant to an award of prejudgment interest.

II. *TEXAS V. NEW MEXICO* IS NOT DISPOSITIVE OF COLORADO'S LIABILITY IN THIS CASE

Kansas argues that Colorado is liable for the violation of the Compact by its water users, regardless of whether Colorado knew, or had reason to know, that the actions of its water users were causing depletions to usable Stateline flows. Kansas Brief at 11. In support of its position, Kansas relies heavily on the fact that New Mexico was held liable for the actions of its water users in *Texas v. New Mexico* and the Court's statement that "good-faith differences about the scope of contractual undertakings do not relieve either party from performance." Kansas Brief at 14-15, 19 n.4, citing *Texas v. New Mexico*, 482 U.S.

at 129.[3] However, there are important differences between *Texas v. New Mexico* and this case, differences that Kansas fails to recognize.

First, in the Pecos River Compact, 63 Stat. 159, New Mexico had agreed that any man-made activities in New Mexico that would deplete the flow of the Pecos River at the New Mexico-Texas state line below a specified amount were prohibited. The Pecos River Compact expressly provided that "*New Mexico shall not deplete by man's activities* the flow of the Pecos River at the New Mexico-Texas state line below an amount which will give to Texas a quantity of water equivalent to that available to Texas under the 1947 condition." *Texas v. New Mexico*, 462 U.S. 554, 559 (1983), *quoting* Pecos River Compact, Art. III(a) (emphasis added).

Second, in *Texas v. New Mexico*, it had been apparent almost from the beginning that the flows of the Pecos River at the state line were below the amount that would have been predicted on the basis of the Inflow-Outflow Manual that had been developed to determine the quantity of water that would be available to Texas under the 1947 condition. 462 U.S. at 558-59, 560. In 1957, the Pecos River Commission authorized a study and in 1962 adopted findings of fact regarding the cumulative shortfalls of state-line flows for the years 1950-1961. *Id.* at 560-61. The scope of New Mexico's obligation may have remained uncertain after 1961, but the existence of a dispute about whether New Mexico was allowing the

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[3] The Court's statement was made in response to New Mexico's argument that its good faith relieved it from any retrospective remedy whatsoever. 482 U.S. at 128-29.

flow of the Pecos River at the New Mexico-Texas state line to be depleted by man's activities below the "1947 condition" was clearly known to New Mexico from a very early date. *Id.*[4]

In contrast, the Arkansas River Compact did not prohibit future beneficial development of the Arkansas River Basin in either State by federal agencies, state agencies, or private individuals. Arkansas River Compact, Art. IV-D. The limitation imposed by the Compact was that "the waters of the Arkansas River . . . shall not be materially depleted in usable quantity or availability for use to the water users in Colorado and Kansas under this Compact by such future development or construction." *Id.*

The Arkansas River Compact created an interstate agency known as the Arkansas River Compact Administration ("Administration"), consisting of three representatives from each State. Arkansas River Compact, Art. VIII-A and -C. The Administration is directed to investigate *promptly* violation of any of the provisions of the Compact and is authorized to report its findings and recommendations to the State official who is charged with the administration of water rights for appropriate action, "it being the intent of this Compact that enforcement of its terms shall be accomplished in general through the State agencies and officials charged with the administration of water rights." *Id.*, Art. VIII-H. Thus, Colorado believes that it should be liable under Article IV-D of the Compact

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[4] Texas finally brought suit in 1974, "after years of relatively fruitless negotiations." *Texas v. New Mexico*, 482 U.S. 124, 126 (1987).

only to the extent it knew, or should have known, that post-Compact well pumping was depleting usable State-line flows in violation of the Compact, but failed to act, just as New Mexico knew that state-line flows of the Pecos River were below the amount that would have been predicted using the Inflow-Outflow Manual, but took no action. *Cf. Wyoming v. Colorado*, 286 U.S. 494, 497, 509-10 (1931) (finding that Wyoming's bill was not defective because it alleged that diversions were made in excess of decree "with the knowledge, permission and cooperation of Colorado."). At the very minimum, the fact that Colorado did not know, or have reason to know, that post-Compact well pumping in Colorado was depleting usable Stateline flows should be a factor in extenuation in awarding any damages, and especially prejudgment interest, during that period. *See Wyoming v. Colorado*, 309 U.S. 572, 582 (1940) (period of uncertainty considered as an extenuating factor in determining whether Colorado should be held in contempt for violation of a decree of the Court equitably apportioning the Laramie River).

In this case, Kansas, unlike Texas, did not request an investigation of post-Compact well pumping by the Administration until 1985. Third Report at 103. In contrast to *Texas v. New Mexico*, there was no awareness by either State of depletions to usable Stateline flows in the years immediately following the adoption of the Compact. In *Texas v. New Mexico*, both States were aware there were shortfalls, but could not agree on how to determine the amount of water that Texas was entitled to receive under the 1947 condition. In contrast, here the Master stated: "I am confident that in 1950, the first year after the compact was signed, and in the early years thereafter, *no*

one had any thought that the compact was being violated." Third Report at 100 (emphasis added). Moreover, sophisticated computer modeling was necessary to determine depletions to Stateline flows. *Id.* at 106.

Colorado agrees that as of 1985, there was a good-faith dispute about the impact of post-Compact well pumping on usable Stateline flows and that Colorado's good-faith is not a defense to a violation of the Compact after 1985. Before that date, however, Colorado was not on notice that post-Compact well pumping was depleting usable Stateline flows in violation of the Compact, and the Administration had made no investigation and no findings of fact or recommendations to State officials in Colorado charged with the administration of water rights regarding post-Compact well pumping. First Report at 155-56. Nor had Kansas made any complaint about post-Compact well pumping until 1985. Third Report at 103.

III. EVEN IF AN AWARD OF PREJUDGMENT INTEREST IS DISCRETIONARY, THE CIRCUMSTANCES OF THIS CASE DO NOT SUPPORT AN AWARD OF PREJUDGMENT INTEREST BEFORE 1985

As Kansas admits, the prejudgment interest inquiry is governed by traditional judge-made principles, inasmuch as Congress has not enacted a statute on the subject. Kansas Brief at 12, citing *City of Milwaukee v. Cement Div., National Gypsum Co.*, 515 U.S. 189, 194 (1995). Kansas argues that the present case is in essence a contract case because the Compact is a contract, Kansas Brief at 13, and that prejudgment interest should be awarded to ensure

that Kansas is fully compensated. *Id.* Kansas acknowledges that even in cases where prejudgment interest is ordinarily awarded, an award of prejudgment interest is not automatic, but rests in the discretion of the tribunal passing on the subject, *id.*, citing *City of Milwaukee*, 515 U.S. at 196, but says that as with other discretionary determinations, the Court's decision must be supported by a circumstance that has relevance to the issue at hand. *Id.* Specifically, Kansas argues that the defendant's good-faith belief that it is not responsible for the plaintiff's loss is not such a circumstance. *Id.* at 14.

In Section I of this brief, Colorado has shown that there is no "general rule" favoring an award of prejudgment interest in a case such as this. However, even if this is a case in which an award of prejudgment interest is within the sound discretion of the Court, the circumstances in this case would not support an award of prejudgment interest before 1985. First, the primary reason for awarding prejudgment interest on damages is to compensate the plaintiff for the loss of use of money due under a contract or as damages from the time the claim accrues until judgment is entered. *City of Milwaukee*, 515 U.S. at 195-96. Awarding prejudgment interest also discourages defendants from delaying payment of a debt or damages. *General Motors*, 461 U.S. at 655 n.10; *see United States v. Texas*, 507 U.S. at 537. However, in the typical case where prejudgment interest is awarded, the claim did not accrue until the defendant knew, or should have known, that its performance was due under a contract, *e.g., United States v. Texas*, 507 U.S. at 532 (Federal Government notified Texas of its debt and informed it that

prejudgment interest would begin to accrue on the balance unless payment was made within 30 days), or the defendant knew or should have known that its actions involved an unreasonable risk of causing injury and those actions caused an injury or loss to the plaintiff. *E.g., City of Milwaukee*, 515 U.S. at 191. In those circumstances, a defendant's good-faith belief that it is not responsible for the plaintiff's loss does not relieve it of the obligation to pay prejudgment interest. *Id.* at 196-97.

Here, Kansas did not request an investigation of a Compact violation until 1985, and Colorado did not know, or have reason to know, that post-Compact well pumping in Colorado was causing depletions to usable Stateline flows for many years. Moreover, contrary to the Master's finding that Colorado knew, or should have known, by 1968 that post-Compact wells were causing material depletions of usable Stateline flows, Third Report at 103, this Court found that the same evidence was too vague and conflicting to demonstrate that Kansas inexcusably delayed in bringing its claim. *Kansas v. Colorado*, 514 U.S. at 688-89. If the evidence was too vague and conflicting to alert Kansas to the need to request an investigation of a Compact violation by the Administration, Colorado should not be charged with knowledge of a Compact violation and failure to act on the basis of the same evidence.[5]

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[5] The Master's view seems to be that by 1968 *both* States knew, or should have known, that post-Compact well pumping in Colorado was depleting usable Stateline flows. In his First Report, the Master said that there was no specific evidence to explain why Kansas failed to request an investigation before 1985, but said that Kansas may have been relying on Colorado's efforts to regulate wells. First Report at 170. He also pointed out the difficulty of determining depletions to usable Stateline flows on the basis of the available evidence. *Id.* at 162-63. The Court did not fully adopt the Master's findings in its 1995 opinion. Rather, the Court held that the evidence available to Kansas was vague and conflicting. *Kansas v. Colorado*, 514 U.S. at 688-89. Even if the Court were to accept the Master's finding that the 1968 Wheeler Report was sufficient to trigger Colorado's obligation to enforce the Compact, the Court should take into consideration the fact that sophisticated computer models necessary to determine depletions to Stateline flows were not available in 1968 and that there were other developments in the 1970s and early 1980s that made it difficult to determine depletions due to post-Compact well pumping. *See* Colorado's Brief in Support of Its Exceptions to the Third Report of the Special Master 30-37. As the Master previously stated: "Experts for both States testified that the only way to isolate depletions caused by postcompact pumping, as opposed to depletions caused by other changes along the stream system, was through the use of hydrologic modeling." App. to Second Report at 16.

Thus, even if this is a case in which an award of prejudgment interest is discretionary, prejudgment interest should not be awarded on damages until 1985, the date Kansas requested an investigation by the Administration. Awarding prejudgment interest on damages prior to the date that Colorado knew, or should have known, of a Compact violation is not consistent with other cases in which prejudgment interest has been awarded and would not encourage state agencies and officials charged with the administration of water rights to act to enforce the terms of the Compact.

IV. THE CONSIDERATIONS IDENTIFIED BY THE MASTER FULLY SUPPORT THE DENIAL OF PREJUDGMENT INTEREST BEFORE COLORADO KNEW, OR SHOULD HAVE KNOWN, THAT POST-COMPACT WELL PUMPING WAS DEPLETING USABLE STATELINE FLOWS

Kansas argues that the Master's denial of prejudgment interest for the period 1950-1968 must find justification in some exceptional circumstance rendering an award of interest unfair. Kansas Brief at 18. This argument is predicated upon Kansas' assertion that there is a "general rule" that prejudgment interest should be awarded in a case such as this, absent some exceptional circumstance, *see* Section I *supra*, and fails to recognize that even in cases where prejudgment interest is ordinarily awarded, an award of prejudgment interest "is by no means automatic." *E.g., United States v. Texas*, 507 U.S. at 536. Even if the Court were to accept Kansas' "general rule," the considerations identified by the Master fully support the denial of prejudgment interest before Colorado knew, or should have known, that post-Compact well pumping was depleting usable Stateline flows.

Kansas states that the Master identified three circumstances that, in his view, made this case exceptional, but argues that none of these circumstances supports the denial of prejudgment interest for the years 1950-1968. Kansas Brief at 18-19. According to Kansas, the three circumstances identified by the Master are: (1) the "great length of time," at least 50 years, since pre-Compact well pumping began to deplete usable Stateline flows in violation of the Compact; (2) the fact that Colorado, like Kansas, was unaware in the early years that depletions were

occurring in violation of the Compact; and (3) the fact that Colorado farmers experienced most of the benefits, while Kansas farmers experienced most of the losses, from the violations of the Compact. *Id.*

Kansas' summary does not fully describe the circumstances identified by the Master for recommending that prejudgment interest be denied for the years 1950-1968. The Master not only found that for many years neither State was aware that post-Compact well pumping in Colorado was violating the Compact, Third Report at 100, 106, but also pointed out the difficulty of determining the impact of post-Compact well pumping on usable Stateline flows:

> The general lack of knowledge in the early years about pumping in Colorado and its impacts along the Arkansas River served to protect Kansas during the liability phase of the case against a claim of laches. The same degree of fairness, I believe, should now relieve Colorado of the obligation to pay full interest rates on damages from depletions during [the]1950-68 period, *which now only with hindsight and the benefit of sophisticated computer modeling can be found to have occurred.*

Id. at 106 (emphasis added).[6]

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[6] Kansas argues that the simple passage of time is not a reason to deny prejudgment interest and that the Master's "startled reaction" to the effect of compounding damages over 50 years is not a proper basis on which to exercise discretion. Kansas Brief at 19-21. The Master did not rely on the "startling results" or the "dramatic impact" of awarding prejudgment interest alone as a basis for recommending the denial of

Colorado disagrees with the Master's finding that by 1968 Colorado knew, or should have known, that post-Compact wells were depleting usable Stateline flows, but fully agrees with the Master that the lack of knowledge of a Compact violation by either State and the difficulty of determining that post-Compact well pumping in Colorado was depleting usable Stateline flows are appropriate factors to consider in determining whether prejudgment interest should be awarded in this case. *See Board of Comm'rs of Jackson County v. United States*, 308 U.S. at 352 (fact that County did not know that taxes were improperly levied on an Indian allotment considered in denying prejudgment interest).

Furthermore, the difficulty of determining that post-Compact well pumping was depleting usable Stateline flows was not limited to the period 1950-1968. *See* Colorado's Brief in Support of Its Exceptions to the Third Report of the Special Master 34-35. Because of that difficulty, and the fact that the evidence available to Kansas that post-Compact well pumping was depleting usable Stateline flows was vague and conflicting, the Court held that Kansas could not be charged with lack of diligence in making its well pumping claim before 1985. *Kansas v. Colorado*, 514 U.S. at 688-89. Even in 1990, Kansas had enormous difficulty proving that post-Compact well pumping had depleted usable Stateline flows in violation of the Compact. As the Master stated in his First Report:

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prejudgment interest. Rather, he pointed them out because they dramatize the effect of awarding prejudgment interest in this case. *See* Third Report at 100.

> The major changes in Kansas' position and evidence cannot be ignored. For some five years the Kansas experts worked to accumulate the necessary data and to develop the H-I model in order to support the state's claims. Yet after Colorado's cross-examination during trial uncovered numerous errors and shortcomings in the Kansas evidence, and after the trial recess caused by Durbin's hospitalization, Kansas' replacement experts testified to substantially different conclusions than those resulting from the original H-I model. Brent E. Spronk, one of Kansas' replacement experts, testified openly that the results of the original H-I model were not reliable. As part of its replacement case, Kansas made numerous changes to the original H-I model, but did not alter its basic logic and structure. In addition, Kansas submitted 63 revised exhibits and 10 new exhibits. *As a result of these changes, Kansas cut its claimed depletions approximately in half. . . .*

First Report at 236-37 (emphasis added) (footnotes and citations omitted).[7]

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[7] Timothy J. Durbin was Kansas' chief technical witness. First Report at 228. He developed the Kansas Hydrologic-Institutional (H-I) model to quantify the impacts of individual causes of depletions, including post-Compact well pumping, on Stateline flows. *Id.* at 229-30. After cross-examination, but before he could begin his redirect testimony, he "suffered a breakdown and was admitted to a psychiatric hospital." *Id.* at 28. Kansas then moved for a continuance to replace him with other experts. *Id.* at 29. Over Colorado's objection, the Master granted a seven-month continuance to allow Kansas to replace Durbin with other experts and to correct and make substantial changes to the H-I Model. *Id.* at 30, 241. With the continuance, and Colorado's need to undertake discovery to respond to the

While, as this Court noted in *Texas v. New Mexico*, "[t]here is often a retroactive impact when courts resolve contract disputes about the promisor's undertaking," in the typical case the defendant knew, or should have known, the nature of its undertaking, despite the dispute about the scope of that undertaking. *E.g., West Virginia v. United States*, 479 U.S. at 307 (West Virginia acknowledged the bills from the Corps but denied liability for the debt on the grounds that the State official entering into the agreement had acted without authority); *cf. United States v. Texas*, 507 U.S. at 531-32 (Texas, through its Department of Human Resources, contractually bound itself to comply with all federal regulations governing the Food Stamp Program, but challenged administrative refusal to grant a waiver of liability and contested liability for prejudgment interest.). The fact that there is a good-faith difference about the scope of a contractual obligation does not relieve either party from performance. *Texas v. New Mexico*, 482 U.S. at 129. In this case, however, there was no good-faith difference about the scope of Colorado's obligation under the Compact or its liability for any losses until 1985. Prior to that time, Colorado believed it was in compliance with the Compact, First Report at 169 ("I do not believe that Colorado officials thought they were sanctioning a compact violation in the well regulations that were established, . . . "), and Kansas had made no complaint about post-Compact well pumping in Colorado. Third Report at 103 ("It is

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revisions and changes by the Kansas replacement experts, it was more than a year before Kansas resumed what it called its "replacement case." *Id.* at 29.

essentially correct that Kansas did not register a formal complaint until 1985, . . . "). Moreover, the Administration had felt no need to undertake an investigation of a Compact violation or to report any findings or recommendations to Colorado officials charged with the administration of water rights for appropriate action. *See* Arkansas River Compact, Art. VIII-H.

The 1968 Wheeler Report, which the Master relies upon as the basis for his finding that by 1968 Colorado knew, or should have known, the impact of post-Compact wells on usable Stateline flows, Third Report at 104, is one of the reports that were available to Kansas and which this Court found were "vague and conflicting" about the impact of post-Compact well pumping on usable Stateline flows. *Kansas v. Colorado*, 514 U.S. at 688-89. Of particular significance, the 1968 Wheeler Report did not consider the effect of increased transmountain imports, which to some extent provided an offset to pumping. *Id.* at 689, *quoting* First Report at 162-63. If the Court accepts the Master's finding that by 1968 Colorado knew, or should have known, that post-Compact wells were causing material depletions of usable Stateline flows, Third Report at 103, then, in fairness, the Court should reconsider its earlier decision that Kansas did not have sufficient evidence available to complain about post-Compact well pumping in Colorado prior to 1985.[8]

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[8] The Master states that the problems of data collection are also enormous in this case. Third Report at 102. Colorado notes that data concerning the number of wells, where they were located, and how much water they pumped were developed by

The Master also recommends that prejudgment interest be awarded on damages, at least from the date Colorado knew, or should have known, of the impact of post-Compact wells on usable Stateline flows because, though a compact deals in water rather than money, "many of the same policies calling for prejudgment interest in general contract situations also apply to interstate water disputes." Third Report at 102. He states:

> The upstream state has a natural geographic advantage. It has first access to the water. It can take what it wants, leaving the downstream state to complain if the upstream use exceeds its compact share. An enforcement action by the downstream state is not only difficult and expensive, it almost always requires years to complete. Generally, a preliminary injunction is not available, and the upstream state continues to have use of water during the long trial. . . .

Id.

While some of the policies favoring an award of prejudgment interest in general contract situations may apply to this case once Colorado knew, or should have

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the U.S. Geological Survey in the 1960s in cooperative studies with Colorado. *See* Colorado's Brief in Support of Its Exceptions to the Special Master's Third Report 32-33; App. to Colorado's Brief, Item 1 (Jt. Exh. 66). The difficulty in determining the impact of post-Compact well pumping on usable Stateline flows was not the lack of data about the number of wells, where they were located, or how much water they had pumped, but the difficulty in determining the impact of pumping on usable Stateline flows and the lack of sophisticated computer models necessary to quantify the effects of well pumping on usable Stateline flows. *Id.* at 30-37.

known, that post-Compact well pumping was depleting usable Stateline flows, some of the Master's comments are wide of the mark.

The fact that Colorado is the upstream state is not of great significance to this Compact.[9] Article IV-D of the Compact did not apply only to Colorado; it applied to future beneficial development in the Arkansas River Basin in both states. Post-Compact well pumping in Kansas can also deplete the waters of the Arkansas River available for use by water users in Colorado if it has the effect of causing Kansas to demand additional releases of water stored in John Martin Reservoir. First Report at 223.

Not every enforcement action is difficult or expensive; this action was particularly difficult and time consuming because of the nature of the post-Compact development involved. Moreover, the fact that enforcement actions may be expensive and time-consuming underscores the fact that this Compact created an Administration with authority to investigate violations of the Compact, to make findings and recommendations to State

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[9] If Colorado has a natural geographic advantage with respect to the waters of interstate rivers, it also has a greater burden to administer water use to comply with interstate water compacts than most downstream states. The headwaters of four major rivers originate in Colorado – the Colorado, the Platte (both North and South), the Rio Grande, and the Arkansas. Colorado is a party to nine interstate water compacts and two equitable apportionment decrees entered by this Court. *See* Colo. Rev. Stat. §§ 37-61-101 to 37-69-101 (setting forth the text of the compacts); *Wyoming v. Colorado*, 259 U.S. 419 (1922) (Laramie River); *Nebraska v. Wyoming*, 325 U.S. 589 (1945) (North Platte River).

officials charged with administration of water rights for appropriate action, and that it was the intent of this Compact that enforcement of its terms be accomplished in general through the State agencies and officials charged with the administration of water rights. Arkansas River Compact, Art. VIII-A, -C, and -H. These provisions in the Compact demonstrate that the policies favoring an award of prejudgment interest apply in this case only when the defendant state knew, or should have known, that a post-Compact development was depleting the waters of the Arkansas River in violation of the Compact. Implicitly, the Master supports an award of prejudgment interest as a method to encourage an upstream state not to withhold water in violation of a compact. Such encouragement, however, can only operate when a state knows, or has reason to know, of a violation of a compact.

V. ARTICLE VII-A OF THE COMPACT DOES NOT MAKE COLORADO LIABLE FOR VIOLATIONS OF THE COMPACT, WHETHER OR NOT COLORADO KNEW, OR HAD REASON TO KNOW, OF SUCH VIOLATIONS

Kansas argues that Colorado is liable for a violation of the Compact caused by the actions of water users in Colorado, and must fully compensate Kansas for such depletions, whether or not Colorado knew, or had reason to know, of such violations on the grounds that "the Compact's express language does not admit of a distinction between a State and its water users." Kansas Brief at 26, citing Arkansas River Compact, Article VII-A. Article VII-A provides as follows:

> A. Each State shall be subject to the terms of this Compact. Where the name of the State or the term "State" is used in this Compact these shall be construed to include any person or entity of any nature whatsoever using, claiming or in any manner asserting any right to the use of the waters of the Arkansas River under the authority of that State.

Kansas argues that because the Compact states that one of the major purposes of the Compact was to "apportion between the States of Colorado and Kansas the waters of the Arkansas River and their utilization . . . ," Arkansas River Compact, Art. I-B, that means that the States and their water users are treated as one.

Colorado agrees that one of the major purposes of the Compact was to apportion the waters of the Arkansas River between Colorado and Kansas and that water users in Colorado are subject to the terms of the Compact. That would have been true without Article VII-A of the Compact. *Hinderlider v. La Plata & Cherry Creek Ditch Co.*, 304 U.S. 92, 106 (1938). Article VII-A simply makes that explicit. *Cf. Badgley v. City of New York*, 606 F.2d 358, 364-66 (2d Cir. 1979) (decree in *New Jersey v. New York*, 347 U.S. 995 (1954), equitably apportioning the Delaware River and its tributaries between New York, New Jersey, and Pennsylvania was conclusive upon all Pennsylvania citizens and their riparian rights), *cert. denied*, 447 U.S. 906 (1980). Colorado agrees that Kansas can enforce the Compact by an injunction against Colorado and that water users in Colorado are also bound by such an injunction. However, whether Colorado is liable for losses, including losses to individual water users in Kansas, due to depletions to usable Stateline flows caused by

the actions of private individuals in Colorado, and prejudgment interest on such losses, prior to the time Colorado knew, or should have known, that such actions were causing a Compact violation is a different question, and must be answered by the terms of the Compact.

This Compact did not prohibit future beneficial development in the Arkansas River Basin by private individuals in either State. The Compact does not address remedies for violation of the Compact, liability for losses suffered by individual water users in the event of a Compact violation, or prejudgment interest. However, the Compact did create an Administration to investigate violations of the Compact and stated that it was "the intent of *this Compact* that enforcement of its terms shall be accomplished in general through the State agencies and officials charged with the administration of water rights." Arkansas River Compact, Art. VIII-H (emphasis added). Consistent with that intent, Colorado believes that it was the intent of the States that they would only be liable for violations of the Compact caused by a post-Compact development where the State knew, or had reason to know, of the violation. Had it been the intent of the States that they would be liable for any violation of the Compact caused by a post-Compact development, the States would have wanted an objective standard to determine each State's entitlement, such as the "1947 condition" in the Pecos River Compact or Article III(d) of the Colorado River Compact.[10] Without some objective standard for

[10] Article III(d) of the Colorado River Compact provides: "The states of the Upper Division will not cause the flow of the river at Lee['s] Ferry to be depleted below an aggregate of

determining each State's entitlement under the Compact, the States would have been undertaking a risky obligation to become liable for all depletions of waters of the Arkansas River usable to water users in the other State, whether they knew, or had reason to know, of the violation. Without a clear expression of intent to undertake such a liability, a compact should not be interpreted to impose such a liability upon a state. *Cf. Alden v. Maine*, 527 U.S. at ___, 119 S.Ct. at ___, 144 L.Ed. 2d at 675 (1999) (noting that Congressional power to authorize suits for compensatory damages by individuals against states could create staggering burdens).

Kansas also argues that Colorado's lack of knowledge is "irrelevant to the issue of whether the plaintiff should be compensated for its loss." Kansas Brief at 24. Kansas argues that "[w]hether or not the parties had any inkling of Colorado's breach of the Compact in the early years, the fact remains that Colorado had use of both water, an asset belonging to Kansas, and the income that it generated." *Id.* at 24-25.

As the Master recognized, Colorado itself did not have use of the water. Third Report at 101. Private individuals in Colorado, not the State of Colorado, pumped and used the ground water. Further, usable Stateline flows are not an asset used by the State of Kansas. Under the laws of Kansas, private individuals and other entities

75,000,000 acre-feet for any period of ten consecutive years reckoned in continuing progressive series beginning with the first day of October next succeeding the ratification of this Compact." *See Arizona v. California*, 373 U.S. 546, 557-58 & n.20 (1963).

use the waters of the Arkansas River, and Article IV-D was intended to protect water users in Kansas, not the State of Kansas, from depletions to usable Stateline flows caused by future development. An award of damages to the State of Kansas based on the losses suffered by private individuals as the result of a violation of the Compact is not "compensatory" in any ordinary sense of the word, Third Report at 101, and an award of prejudgment interest should not result in overcompensating Kansas. *See Commercial Union Assur. Co. v. Milken*, 17 F.3d 608, 614 (2d Cir.), *cert. denied*, 513 U.S. 873 (1994); *United States v. Foster Wheeler Corp.*, 447 F.2d 100, 102 (2d Cir. 1971) (prejudgment interest disallowed under False Claims Act because double damages and forfeiture payments more than made the Government whole).

If Kansas were acting as a trustee for its water users to present and enforce their individual claims against Colorado, an award of damages for losses suffered by individual water users would be compensatory, but it would also violate the 11th Amendment. *See* Colorado's Brief in Support of Its Exceptions to the Third Report of the Special Master 13-21, and cases cited therein. Had there been no post-Compact well pumping in violation of the Compact, the State of Kansas would not have received money equivalent to the losses of its water users. Third Report at 101. The impact on the State of Kansas would have been limited to an increase in income tax revenues and the secondary impacts to the Kansas economy. *Id.*

Thus, if the Court accepts the Master's recommendation that Kansas should be awarded damages for all losses resulting from depletions to usable Stateline flows

caused by post-Compact well pumping, including the losses suffered by individual water users, such an award is more than adequate to make the State of Kansas whole for income tax losses and secondary impacts to the Kansas economy and should not include prejudgment interest. *E.g., United States v. Foster Wheeler Corp.*, 447 F.2d at 102. Further, an award of damages based on the losses suffered by individual water users in Kansas should depend on a finding that Colorado knew, or should have known, that post-Compact well pumping in Colorado was depleting usable Stateline flows in violation of the Compact, but failed to act to enforce the terms of the Compact. At that point, an award of damages based on the losses suffered by individual water users, while still not compensatory, might serve the purpose of encouraging a state to act to enforce the terms of the Compact. *See* Arkansas River Compact, Art. VIII-H. For the reasons previously stated, however, Colorado does not believe that Colorado should be charged with knowing, or that it should have known, that post-Compact well pumping in Colorado was depleting usable Stateline flows in violation of the Compact until 1985, when Kansas requested an investigation by the Administration. First Report at 155-56 ("The record supports Colorado's assertion that no formal complaint to the compact administration, or indeed to any appropriate Colorado officials, was made before 1984 (if the Simons, Li report is considered as such) or otherwise before 1985, when Kansas asked the compact administration to undertake an Article VIII-H investigation.").

Kansas further argues that, "consistent with th[e] definition [in Article VII-A] is the Compact's purpose to

resolve disputes and controversies, not only between the States as such, but also 'between citizens of one and citizens of the other State.' " Kansas Brief at 26, *quoting* Arkansas River Compact, Art. I-A. That was, in fact, one of the purposes of the Compact, and states have the power to settle disputes between their citizens over the use of waters of an interstate river by entering into a compact. *Hinderlider*, 304 U.S. at 106-08. However, merely entering into a compact to resolve disputes and controversies "between citizens of one and citizens of the other State" does not waive the State's 11th Amendment immunity to suits by citizens of the other State. *See Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 305 (1990) (waiver of 11th Amendment immunity must be express or by overwhelming implication from the text). Nor does it suggest that Colorado agreed to become liable to Kansas for all losses that occurred as a result of a violation of the Compact by future beneficial development, including losses suffered by individual water users in Kansas, and prejudgment interest on such losses.

Finally, Kansas says that this Court has previously determined in this case that Colorado "bears liability for the actions of its water users." Kansas Brief at 27, citing *Kansas v. Colorado*, 514 U.S. at 693-94. In fact, all the Court did was agree with the Special Master's conclusion that post-Compact well pumping in Colorado had caused material depletions of the usable Stateline flows of the Arkansas River, in violation of the Arkansas River Compact. At that time, the Special Master had not determined the amount of such depletions or when such depletions had occurred, or whether Colorado knew, or should have known, that post-Compact well pumping was depleting

usable Stateline flows prior to 1985 when Kansas made a complaint to the Administration. All of those issues, including the extent of Colorado's liability for such depletions, were deferred to additional proceedings.

CONCLUSION

1. There is no "general rule" that prejudgment interest should be awarded in a case such as this, absent some exceptional circumstance. The common-law rule is that prejudgment interest is not awarded on unliquidated claims, and there is no reason to deviate from the common-law rule in this case.

2. Even if the Court concludes that an award of prejudgment interest is within the sound discretion of the Court, an award of prejudgment interest would not be justified in this case before Colorado knew, or should have known, that post-Compact well pumping was depleting usable Stateline flows in violation of the Compact.

3. Neither *Texas v. New Mexico* nor the express terms of the Compact suggest that Colorado should be held liable for a violation of the Compact by its water users, regardless of whether it knew, or should have known, that post-Compact well pumping was causing depletions to usable Stateline flows in violation of the Compact. If Kansas is awarded damages based on the losses suffered by individual water users in Kansas, such an award is more than adequate to make the State of Kansas whole for income tax losses and secondary impacts to the

Kansas economy and should not include prejudgment interest.

Respectfully submitted,

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